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No. 80131-2  
COA No. 57254-7-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,  
Respondent

v.

JAMES ALEXANDER,  
Petitioner

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 FEB 21 PM 4:28

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie Churchill, Judge

PETITION FOR REVIEW

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

*Island County Prosecutor*  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

*Eric Broman* 2/21/08  
Done in Seattle, WA Date

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A. IDENTITY OF PETITIONER

Petitioner James Alexander, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Alexander seeks review of Division One's decision in State v. Alexander, No. 57254-7-I (January 22, 2008), attached as appendix

A.

C. ISSUES PRESENTED FOR REVIEW

1. Does the mandatory joinder rule require dismissal of later additional and more serious charges when they are related to previously filed charges, the state was negligent in its failure to join them at the time of the original charging, and the state's subsequent filing decision suggests vindictiveness?

2. Does a presumption of prosecutorial vindictiveness arise from the state's later filing of additional more serious charges after petitioner succeeded in reversing and vacating his felony murder conviction?

3. Does application of the "ends of justice" exception to the mandatory joinder rule violate petitioner's state and federal rights to due process of law, where the greater charge was available at the time of the initial prosecution, and where the only changed

circumstance was petitioner's successful exercise of the right to appeal his unlawful conviction?

4. Was disqualification of the trial judge warranted when the judge made comments during a pretrial ruling expressing her belief in petitioner's guilt, and ultimately reversed herself amid extensive media coverage of this ruling?

5. Was disqualification of the trial judge warranted when the judge had previously represented petitioner's ex-wife during petitioner's first trial for the same conduct for which he now stood trial, and that representation involved obtaining a restraining order against petitioner while murder charges were pending against him for the death of his ex-wife's child?

6. Does the application of the Laws of 2005, ch. 68, § 4 (the "Blakely fix" statute) violate petitioner's Sixth Amendment rights to a jury trial?

D. STATEMENT OF THE CASE<sup>1</sup>

The state charged Alexander in 1991 with second degree felony murder of his 21-month-old son Bryan, based on second degree assault. CP 495, 512. The state theorized Alexander beat and kicked Bryan to death. He was sentenced to 300 months in

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<sup>1</sup> Citations to the record and trial transcripts are set forth in full in the Brief of Appellant, at 3-15.



prison. CP 496. The conviction was affirmed in 1993. State v. Alexander, No. 30004-1-I (October 4, 1993). The Court of Appeals granted Alexander's personal restraint petition in 2005, directing the trial court to vacate the felony murder conviction based on Andress and Hinton.<sup>2</sup>

The state then sought to file related charges: one count of homicide by abuse and one count of first degree assault. CP 197. Alexander moved to dismiss, arguing the state could not file related charges of the same or higher degree under the mandatory joinder rule. CP 494. Rather, he argued, the only legal alternative to dismissal would be to direct a verdict on the lesser offense of manslaughter. 7RP 3.<sup>3</sup> In its oral ruling, the trial court agreed, dismissed the charges and directed a verdict for first degree manslaughter. 7RP 60. The state then requested the matter be set over for sentencing. 7RP 60-62.

Two days later, the state filed a motion asking the court to reconsider. CP 346; 8RP 2. The court granted the state's motion and reversed its previous ruling dismissing the charges and directing a manslaughter verdict. CP 376; 8RP 31. This followed substantial

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<sup>2</sup> In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002); In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

<sup>3</sup> There are 28 volumes of transcripts. This petition refers to them as 1RP-28RP, as set forth in appendix B.

media coverage of the dismissal ruling in the local community. CP 345, 380-82.

The case was then set for trial on the new charges. The jury found Alexander guilty as charged on both counts, CP 83-84. The standard range for count I was 250-333 months. CP 23.<sup>4</sup> The jury also found the state proved three aggravating circumstances. CP 74-77.<sup>5</sup> Based on these findings, the trial court imposed an exceptional sentence of 400 months in prison. CP 23, 26.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. ALLOWING AN INCREASED CHARGE TO MEET THE "ENDS OF JUSTICE" EXCEPTION CONFLICTS WITH THIS COURT'S DECISIONS AND RAISES QUESTIONS OF PUBLIC IMPORTANCE.

On appeal, Alexander argued the state violated the mandatory joinder rule by not joining the more serious homicide by abuse charge in 1991. For settled discussions of the mandatory joinder rule, Alexander relied on decisions from this Court, State v. Dallas, 126 Wn.2d 324, 331-33, 892 P.2d 1082 (1995) and State v. Anderson, 96 Wn.2d 739, 740-41, 638 P.2d 1205 (1982) (Anderson II). Alexander

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<sup>4</sup> The trial court ruled that counts I and II were the same criminal conduct. It did not include count II in the count I offender score. CP 22, 26, 30.

<sup>5</sup> The aggravating factors were based on particular vulnerability, domestic violence, and abuse of a position of trust. CP 76-77.

also distinguished Division One's decision in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004). BOA at 15-23.

The Court of Appeals, however, determined Anderson "has no application here," reasoning Anderson did not directly address the "ends of justice" exception to the mandatory joinder rule. Slip op. at 4. The court instead relied on its decision in Ramos. Slip op. at 4-5.

This Court should accept review for four reasons. First, similar issues are pending before this Court in several cases.<sup>6</sup> Review of these constitutional issues of substantial public importance is

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<sup>6</sup> The Commissioner's issue summaries, posted on the Court's website, include:

State v. Ramos and Medina, No. 77347-5 (argued 9/25/07),

Whether defendants whose convictions for second degree felony murder were vacated under *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), may be recharged with first degree manslaughter without violating the mandatory joinder rule, CrR 4.3.1(b)(3), or double jeopardy principles.

State v. Wright, Garrett and Bryant, No. 78465-5 (argued 5/22/07):

Whether, following vacation of the defendants' convictions for second degree felony murder pursuant to *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), the State is barred by double jeopardy principles from trying the defendants for second degree intentional murder when the State initially charged this intentional murder alternative but failed to submit the intentional murder charge to the jury at the defendants' first trials.

appropriate here as well. RAP 13.4(b)(3), (4).

Second, the court of appeals erred in relying on Ramos. As Alexander's brief showed in thorough detail, the prosecutors in Ramos at least properly charged all related charges, including the higher charge, at the outset. BOA, at 20-23. Here, however, the state failed to comply with minimal SRA charging standards. Defense counsel in 1991 moved to dismiss the charge on grounds ultimately upheld by this Court in Andress. The state's risky choice to put all its eggs in the felony murder basket was not a circumstance outside its control. Cf. Anderson II, at 743 (finding a violation of the mandatory joinder rule where the defense, like Alexander's trial counsel, gave the state notice of the charging deficiency in a motion filed before the first trial).

Third, the court of appeals decision conflicts with this Court's analysis in Anderson II. BOA at 16-21. RAP 13.4(b)(1).

Fourth, the court of appeals' expansion of Ramos, to allow the state to pursue higher related charges on remand, raises an issue of substantial public interest that this Court should review. RAP 13.4(b)(4).

2. VINDICTIVE STATE CHARGING DECISIONS FOLLOWING A SUCCESSFUL APPEAL VIOLATE DUE PROCESS AND CANNOT BE CURED BY EXPANDING THE "ENDS OF JUSTICE" EXCEPTION.

Alexander also argued the increased charge, following a successful appeal, raised a presumption of vindictiveness and violated his due process rights. BOA at 23-29. Constitutional due process principles prohibit prosecutorial vindictiveness. U.S. Const. amend. 14; Const. art. 1, § 3; United States v. Goodwin, 457 U.S. 368, 372-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982); Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). Prosecutorial vindictiveness occurs when "the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights." Korum, at 627 (citing United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987)).

The cases recognize two kinds of prosecutorial vindictiveness, actual vindictiveness and presumed vindictiveness. Korum, at 627. The presumption arises when an accused can show that "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness." Id. (citing 810 F.2d at 1246). The prosecution may then rebut the presumption by presenting "objective evidence justifying the prosecutorial action." Id., at 628 (citing 810 F.2d at 1245).

As the United States Supreme Court recognized in Goodwin, "a change in the charging decision after an initial trial is much more likely to be improperly motivated than is a pretrial decision." 102 S.Ct. at 2493. The post-Goodwin case law recognizes it is presumptively vindictive to punish an accused for exercising constitutional rights, such as the right to appeal. A prosecutor therefore cannot file higher charges on remand simply because the accused succeeded in winning reversal on appeal. Owens v. State, 822 N.E.2d 1075 (Ind. App. 2005) (vindictiveness is presumed where prosecutor files additional charge following successful appeal); accord, State v. Marti, 143 N.H. 608, 732 A.2d 313 (1999).<sup>7</sup>

The court of appeals, without explanation, parenthetically disagreed with Alexander's claim that the increased charge raised a presumption of vindictiveness. Slip op. at 5. This was error under Goodwin and Korum.

The court of appeals then determined the "objective evidence justified the charges." Slip op. at 5. The court of appeals reached this conclusion by accepting the state's claim that certain evidence was unavailable at the first trial. Slip op. at 5.

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<sup>7</sup> See also, Korum, 157 Wn.2d at 656, 661 (J.M. Johnson, J., concurring) (the presumption of prosecutorial vindictiveness applies where the state increases charges after a defendant successfully vindicates constitutional rights on appeal).

The trial court, however, rejected that same claim. The trial court found the only "new" evidence was available to the state in 1991 had it engaged in additional investigation at that time. 7RP 50-54; 8RP 27. This finding was supported by the defense declarations establishing the state's reliance on the same evidence in 1991 as it did in 2005, as well as the prosecutor's closing argument in the second trial. CP 424-93; 7RP 50-54.<sup>8</sup>

This Court therefore should accept review because the court of appeals decision conflicts with this Court's analysis in Korum. RAP 13.4(b)(1). The imposition of a 400-month sentence, after the court's initial imposition of a 300-month sentence, also violated Alexander's state and federal due process rights. The Ramos "ends of justice"

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<sup>8</sup> The state did not cross appeal the trial court's finding. Defense counsel's motions and declarations provided substantial insight into the prosecutor's 1991 charging decision. CP 423-93. Counsel's proof was confirmed by the prosecution's closing argument, where the prosecutor claimed the homicide by abuse charge was particularly fitting for the facts of Alexander's case. As the prosecutor asserted, this was not a case where the accused "snapped" on one particular occasion and shook a baby to its death, facts that might make it difficult to prove the "pattern of abuse" element. Rather, the state asserted the evidence of a pattern of abuse was virtually uncontroverted, as Alexander himself did not deny that he routinely disciplined his young children with physical force. Moreover, the fact that all prior abusive acts would be admissible only strengthened the state's case. Perhaps most tellingly, the state's decision to charge an intentional first degree assault established its belief that the assaultive acts were intended, not reckless or negligent. 23RP 321-25, 327-37, 339, 409, 414. All of this evidence was available in 1991.

exception cannot justify increased charges and sentences following remand from a successful appeal without violating due process. RAP 13.4(b)(3).

Alexander's position is also consistent with this court's recent discussion in State v. Hall, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2008 Wash. LEXIS 55 (No. 78658-5, 1/31/08). As this Court recognized in Hall, there is a fundamental difference when the state seeks to advance its position following Andress, rather than merely retain an initial conviction and sentence. In Hall, the state proactively sought to vacate Hall's felony murder conviction even though Hall had not challenged it. The state then filed additional charges, including first degree manslaughter and first degree assault. Hall, slip op. at 2-3. Although this Court ultimately did not decide the precise issues Alexander raises,<sup>9</sup> it did recognize the focus of the double jeopardy clauses is to recognize "an individual's right to be free from an overreaching government." Slip op. at 7.

By citing Ramos and allowing the government to file a more serious charge based on nothing more than Alexander's successful PRP, the court of appeals decision also conflicts with this discussion in Hall. Review should be granted. RAP 13.4(b)(1).

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<sup>9</sup> Hall, slip op. at 1, n.1.



3. THE TRIAL COURT'S REFUSAL TO RECUSE ITSELF  
VIOLATED ALEXANDER'S DUE PROCESS RIGHTS.

Before trial, defense counsel filed motions to disqualify the trial judge. As shown in Alexander's brief, the judge's comments about her belief in Alexander's guilt and the decision to reverse herself amid intense media coverage created an appearance of bias and partiality. Moreover, she previously represented Alexander's ex-wife, Bernadette Wacker, in a dissolution proceeding against Alexander at the time he first stood trial in 1991. As the state's key witness in Alexander's first trial, it is reasonable to infer Wacker spoke with her dissolution attorney about the circumstances leading up to the death of their son. BOA at 29-33.

A person accused of a crime has the right to due process of law. Const. art. I, § 3; U.S. Const. amends. 5, 14. An unbiased judge and the appearance of fairness are hallmarks of due process. In re Murchison, 349 U.S. 133, 55 S. Ct. 623, 99 L. Ed. 942 (1955); Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993). "No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or

attorney, or the interest of any party or attorney appearing in such cause." RCW 4.12.040.

A party need not establish actual prejudice. It is sufficient that an appearance of impropriety exists. State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). For the reasons set forth in Alexander's brief, the court of appeals erred in rejecting this claim. This Court should accept review of this constitutional claim. RAP 13.4(b)(3).

4. ALEXANDER SEEKS TO EXHAUST HIS STATE REMEDIES IN CHALLENGING THE "BLAKELY FIX" STATUTE, SB 5477.<sup>10</sup>

Alexander challenged the exceptional sentence provisions of SB 5477, the "Blakely fix" statute, formerly codified as RCW 9.94A.537 (Laws of 2005, ch. 68, § 4). BOA at 34-37. By imposing an exceptional sentence only on those who proceed to trial, the statute unconstitutionally chills the Sixth Amendment right to demand a jury trial. It therefore is unconstitutional. United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 1216-17, 20 L. Ed. 2d 138 (1968); State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980) (sentencing statute that chills the exercise of jury trial rights is unconstitutional); accord, State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981).

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<sup>10</sup> Alexander recognizes this Court has rejected this claim in State v. Pillatos, 159 Wn.2d 459, 477-78, 150 P.3d 1130 (2007), but seeks to preserve potential federal habeas corpus review. BOA at 34, n.13.

F. CONCLUSION

For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 21<sup>st</sup> day of February, 2008.

Respectfully submitted,

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## APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 57254-7-1
	)	
Respondent,	)	
	)	
v.	)	
	)	
JAMES G. ALEXANDER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 22, 2008

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PER CURIAM — Whether the ends of justice would be defeated by dismissing charges normally subject to the mandatory joinder rule is a determination for the trial court. After the reversal of James Alexander's felony murder conviction for killing his 21 month old son under In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), the trial court determined that the ends of justice would be defeated if the State's subsequently filed charges of homicide by abuse and first degree assault were dismissed pursuant the mandatory joinder rule. Because Alexander fails to establish any error in that determination or in the trial court's denial of his motions for recusal, we affirm.

FACTS

In 1991, James Alexander beat his 21 month old son to death in the presence of his 3 year old stepson, whom he also struck repeatedly. The State charged Alexander

with one count of second degree felony murder based on second degree assault and one count of second degree criminal mistreatment. A jury found Alexander guilty on both counts and the trial court imposed an exceptional sentence of 300 months. The verdict and sentence were affirmed on direct appeal. State v. Alexander, No. 30004-1-1 (Wash. Ct. App. Oct. 4, 1993).

In 2005, Alexander filed a personal restraint petition challenging the validity of his felony murder conviction in light of Andress and In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). We granted the petition and remanded for further proceedings. After the trial court vacated the felony murder conviction as required by Andress, the State charged Alexander with homicide by abuse and first degree assault, alleging aggravating factors for both counts.

Initially the trial court granted Alexander's motion for dismissal under the mandatory joinder rule and ordered entry of a verdict of guilty on first degree manslaughter.<sup>1</sup> The State moved for reconsideration under the ends of justice exception to the mandatory joinder rule. The court reconsidered, denied Alexander's motion to dismiss, and reinstated the charges.

Prior to trial, Alexander twice filed motions asking the trial judge to recuse herself, arguing first that the judge's comments at the time she directed a manslaughter verdict indicated her belief in Alexander's guilt and that her reluctance to dismiss the charges created an appearance of bias and partiality; and second, that the judge's

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<sup>1</sup> Alexander had argued, and the trial court originally agreed, that such a result was required by State v. Gamble, 118 Wn. App. 332, 339-40, 72 P.3d 1139 (2003), in which Division II of this court held that the appropriate remedy following vacation of second degree felony murder under Andress is remand for entry of judgment and sentence on the lesser-included offense of first degree manslaughter. The Supreme Court opinion reversing that part of the Division II decision was not published until June 2005. State v. Gamble, 154 Wn.2d 457, 469-70, 114 P.3d 646 (2005).

representation of Alexander's wife in dissolution proceedings during the 1991 trial required disqualification. The trial denied both motions.

Following trial, the jury found Alexander guilty as charged and the court imposed an exceptional sentence of 400 months.

Alexander appeals.

### DISCUSSION

Alexander first asks this court to hold as a matter of law that permitting the State to charge a more serious crime after vacation of his felony murder conviction violated the mandatory joinder rule.

The rule requires the State to join any and all related offenses for trial. CrR 4.3.1. Offenses within the jurisdiction and venue of the same court and based on the same conduct are "related offenses." State v. Lee, 132 Wn.2d 498, 502, 939 P.2d 1223 (1997). "Same conduct" is conduct involving a single criminal incident or episode. Id. at 503. When a defendant who has been tried for one offense moves to dismiss a later charge for a related offense, the court must grant the motion unless it "determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted." CrR 4.3.1(b)(3). Whether the ends of justice would be defeated by dismissing such a charge is a determination for the trial court. State v. Ramos, 124 Wn. App. 334, 343, 101 P.3d 872 (2004); State v. Gamble, 137 Wn. App. 892, 904, 155 P.3d 962 (2007).

The State concedes that homicide by abuse and first degree assault are related charges. The State contends the court did not abuse its discretion by applying the ends of justice exception.

Relying on State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205 (1982), Alexander argues the trial court should have limited any subsequent prosecution to lesser offenses included within the original charge. But Anderson has no application here. The opinion does not address the ends of justice exception.

In State v. Ramos, 124 Wn. App. 334, 343, 101 P.3d 872 (2004), this court held that the decision in Andress abrogating the felony murder rule “represented an unexpected change in long-standing decisional law and implicates the ends of justice exception to the [mandatory] rule,” and we remanded the case for the trial court to determine the justice of further proceedings. The charges available to the State on remand were limited by double jeopardy principles based on the following aspects of the first trial: (1) the jury implicitly acquitted the defendants of the original charge of first degree intentional murder by returning a verdict on the lesser included offense of felony murder; and (2) the jury expressly found that the State failed to prove the defendants acted with intent to kill the victim. Id. at 342–43.

Alexander attempts to distinguish Ramos by contrasting the original charges. He contends the prosecutor in Ramos properly joined all related offenses including the highest possible charge, whereas the prosecutor here negligently or deliberately relied on the risky strategy of charging only felony murder. He claims the prosecutor’s negligent charging decision here is not the kind of extraordinary circumstance outside the State’s control that would allow for application of the ends of justice exception. But when the State filed the original charge in 1991, it was not unreasonable or negligent or



risky to rely solely on the felony murder charge. The State could not have foreseen the “highly unusual” abandonment of more than 25 years of precedent that occurred in Andress. Id. at 342. Because it was the decision in Andress, not any action or inaction on the State’s part, which required the vacation of Alexander’s felony murder conviction, we cannot conclude that the trial court erred in its application of the ends of justice exception as a matter of law. Instead, the record reflects that the trial court properly considered the facts and circumstances and determined that the ends of justice would be defeated if Alexander’s motion to dismiss the new charges were granted.

Alexander next contends the State’s decision to file more serious charges, and the longer sentence he received after the second trial, create a presumption of prosecutorial vindictiveness that is incompatible with the ends of justice. “A presumption of vindictiveness arises when a defendant can prove that ‘all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.’” State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006) (quoting United States v. Meyer, 258 U.S. App. D.C. 263, 810 F.2d 1242, 1246 (1987)). The State may rebut the presumption by presenting “objective evidence justifying the prosecutorial action.” Id. (quoting Meyer, 810 F.3d at 1245).

Even if the State’s charging decision could have raised a presumption of vindictiveness under these circumstances (a proposition with which we do not agree), the objective evidence justified the charges. In 1991, Alexander’s wife Bernadette Wacker had recently moved to the United States from the Philippines, spoke very little English, and was naïve regarding child development and appropriate discipline. When a police detective interviewed Wacker in 2005 before the prosecutor filed the new charges, Wacker’s English had improved significantly and she was able to describe the

history of Alexander's abuse of the children, including specific instances of inappropriate discipline. After reviewing the additional information provided by Wacker, the prosecutor concluded that unlike the circumstances in 1991, sufficient evidence existed in 2005 to establish a pattern of child abuse, an element of the homicide by abuse charge.

Based on this record, Alexander fails to establish any error in the trial court's application of the ends of justice exception to the mandatory joinder rule.

Alexander next contends the trial judge erred by denying his motions for recusal. A party who alleges bias or prejudice must support the claim with evidence before the appearance of fairness doctrine will be applied. State v. Post, 118 Wn.2d 596, 618–19 n.9, 826 P.2d 172 (1992); State v. Carter, 77 Wn. App. 8, 11–12, 888 P.2d 1230 (1995). Alexander contends the judge's comments during the March 2005 hearing when she initially dismissed the charges demonstrate bias. In particular, he points to the judge's description of the facts as "disturbing," and her question as to how a father could be deliberately cruel to a child. Because the comments were reported by the media, Alexander speculates that the judge's later decision reinstating the charges further demonstrates bias based on a political motive. But comments regarding the strength of evidence outside the presence of the fact-finder is not evidence of actual or potential bias, particularly where, as here, there is no objective evidence of bias during trial or sentencing. Carter, 77 Wn. App. at 11–12.

Alexander also argues that the judge's representation of Wacker in her action to dissolve her marriage to Alexander required recusal. He speculates that the judge may have gathered information or spoken with him when she assisted Wacker in obtaining a restraining order. The judge stated she had no memory of the case. After reviewing the

dissolution file, the judge stated on the record that her representation of Wacker was very brief, that she never spoke to Alexander, and that the only order she sought in the case sought limits on disposal of marital property.<sup>2</sup> She denied the motion to recuse. Alexander's speculation and proposed inferences do not constitute evidence of actual or potential bias. The trial court did not err in denying the motions for recusal.

Finally, Alexander argues that former RCW 9.94A.537 (Laws of 2005, ch. 68, § 4), providing for the determination of aggravating factors by juries, unconstitutionally chills the right to a trial. Because our Supreme Court has rejected that argument, we need not address it. State v. Pillatos, 159 Wn.2d 459, 477-78, 150 P.3d 1130 (2007).

Affirmed.

FOR THE COURT:

Elemyon, J.

Grosse, J.

Baker, J.

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<sup>2</sup> The record of the dissolution proceeding shows that Vicki Churchill filed a petition for dissolution on behalf of Wacker on August 23, 1991, obtained an order restraining disposition of property on August 30, and on December 4, 1991, presented an agreed order dismissing the petition for dissolution.

## APPENDIX B

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